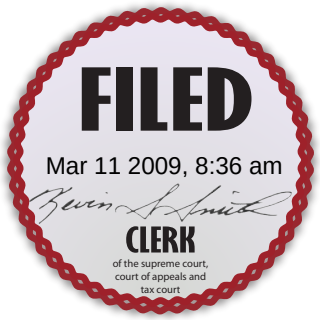

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IN THE
COURT OF APPEALS OF INDIANA

THOMAS LEE KELLER and SHIRLEY JEAN ROHRS,	)	
Appellants-Defendants,	)	
vs.	)	No. 17A03-0810-CV-487
DANIEL KELLER,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEKALB CIRCUIT COURT
The Honorable Kirk D. Carpenter, Judge
Cause No. 17C01-0405-CC-029

March 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Thomas Lee Keller ("Tom") and Shirley Jean Rohrs appeal the trial court's order of sale procedure. Tom and Shirley raise one issue, which we revise and restate as whether the trial court abused its discretion in its Order of Sale Procedure issued September 3, 2008, when it appointed Oberlin Real Estate and Auctioneers, Inc. ("Oberlin"), to conduct the public auction of the family farm. On cross appeal, Dan raises one issue, which we revise and restate as whether he is entitled to receive appellate attorney fees because of Tom and Shirley's substantive bad faith. We affirm.

The relevant facts, as stated in our prior decision, follow:

> Tom, Shirley, and Daniel Keller ("Dan") are siblings. Each owns an undivided one-third interest in the [Keller Farm][1] as tenants in common. The [Keller Farm] consists of approximately one hundred and sixty acres of land located in DeKalb County, Indiana. It is zoned CI-1 Open Industrial. Single-family residences are not permitted in this type of zoning district in DeKalb County.
>
> Because of a lack of cooperation in the ownership of the [Keller Farm], on May 20, 2004, Dan filed a complaint requesting that the trial court partition the [Keller Farm], or, if that was not possible, that the [Keller Farm] be sold and the proceeds divided between him, Tom, and Shirley. A bench trial was held on September 12, 2006. During the trial, Dan, Tom, and Shirley all stipulated that the [Keller Farm] could not be divided without damage to them.
>
> Dan testified that he wanted the [Keller Farm] to be sold at a public auction, as he believed this would maximize the value of the [Keller Farm]. He noted that the [Keller Farm] is located just east of a business called Steel Dynamics, Incorporated ("SDI"). In 1995, SDI made an offer to purchase the [Keller Farm]. At that time, SDI was willing to pay $8,000 per acre. Dan stated that he had recently spoken with Mark Miller, SDI's vice president, about the property. Based on this, Dan believed that SDI was currently interested in purchasing the [Keller Farm].

[1] The family farm in question comprises two farms: the "Derrow Farm" and the "Keller Farm." Appellant's Appendix at 79. No party objected to the sale of the Derrow Farm, of which Tom and Dan each own an undivided one-half interest. Thus, the trial court's ruling as to the Keller Farm, of which Tom, Shirley, and Dan each own an undivided one-third interest, was the subject of the parties' earlier appeal.

> Tom and Shirley testified that they did not want the [Keller Farm] sold at a public auction. The [Keller Farm] is the family homestead of the Keller family. Shirley testified that the [Keller Farm] has sentimental value to her, as it is where she was born and raised. Tom currently earns his living by farming the [Keller Farm] along with certain other properties. Tom's home is located on land contiguous to the [Keller Farm]. Shirley also owns land that is contiguous to the [Keller Farm] where she would like to build a home. Shirley and Tom both testified that they want the [Keller Farm] to remain in operation as a farm with Tom continuing to farm the land.
>
> Tom and Shirley introduced an appraisal into evidence that showed the [Keller Farm] had a value of $648,000. Tom requested that the trial court allow him to buy Dan's interest in the [Keller Farm] for one third of the appraised value, which would have been $216,000. The trial court, though, found this appraisal of minimal relevance because the [Keller Farm] was zoned for industrial uses, but the appraisal was "based on the use of the land as a single family residence . . . ." Appellant's Appendix at 11. Tom also stated that he would not oppose the trial court ordering a new appraisal for the [Keller Farm], and that he would be willing to buy Dan's interest in the [Keller Farm] for one third of the new appraised value. Tom testified that he could obtain the financing necessary to purchase Dan's interest in the [Keller Farm].

Keller v. Keller, 878 N.E.2d 525, 526-527 (Ind. Ct. App. 2007) (footnote omitted), trans. denied. The trial court found that the Keller Farm could not be divided without damage to the owners and that the highest and best use of the Keller Farm is "Open Industrial." Id. at 527. The trial court therefore ordered that the Keller Farm be sold at a public auction with the net proceeds to be paid to Tom, Shirley, and Dan in equal shares. Id. The trial court named Oberlin as the commissioner to conduct the auction. Tom and Shirley appealed the trial court's order, and we affirmed the trial court.[2] Id. at 528. The Indiana Supreme Court denied transfer.

[2] Tom and Shirley did not raise the issue of Oberlin's appointment in their earlier appeal.

At a status hearing on July 29, 2008, Tom and Shirley proposed that The Steffen Group, Inc. ("Steffen"), conduct the auction, but Dan proposed that LittleJohn Auctions, Inc., conduct it. On September 3, 2008, the trial court issued an order of sale procedure finding that Tom, Shirley, and Dan "have historically been contentious" and "very distrustful" of each other and that "accepting either of the parties[']proposed auctioneers would lead to further discord and distrust between the parties." Appellant's Appendix at 10. The trial court therefore reappointed Oberlin to be the commissioner to conduct the sale and set the date of the public auction for November 22, 2008. On October 1, 2008, Tom and Shirley filed a notice of appeal from the trial court's order of sale procedure. Tom and Shirley also filed a motion for stay of the sale, which the trial court granted on October 9, 2008.

I.

The first issue is whether the trial court abused its discretion when it appointed Oberlin to be the court commissioner to conduct the public auction of the family farm. Where real property cannot be physically divided without damage to the owners, Ind. Code § 32-17-4-12(a) gives the trial court discretion to "order the whole or any part of the land to be sold at public or private sale on terms and conditions prescribed by the court." Keller, 878 N.E.2d at 528. Ind. Code § 32-17-4-14 provides:

> (a) If the court orders a sale under [Ind. Code § 32-17-4-12], the court shall appoint a commissioner, other than a commissioner appointed to make partition, to conduct the sale.
>
> (b) A commissioner appointed under this section shall file a bond payable to the state of Indiana in an amount determined by

> the court, conditioned for the faithful discharge of the duties of the commissioner's trust.

We review the trial court's order for abuse of discretion. See Cohen v. Meyer, 701 N.E.2d 1253, 1255 (Ind. Ct. App. 1998). "A trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before the court or is contrary to law." Keller, 878 N.E.2d at 528.

Tom and Shirley argue that the trial court abused its discretion when it appointed Oberlin instead of Steffen because "Steffen is superior in methods of marketing and attracting a wider pool of potential buyers." Appellant's Brief at 7. They also complain that Oberlin's "commission would be a percentage higher than that of [Steffen]." Id. at 6.

We note initially that, pursuant to Ind. Code § 32-17-4-14, the trial court had appointed Oberlin as commissioner in its October 26, 2006 order previously appealed from, and was not required to further consider the proposals of the parties. The trial court found that the parties in this case have "historically been contentious" and "very distrustful" of each other and that "accepting either of the parties[']proposed auctioneers would lead to further discord and distrust between the parties." Appellant's Appendix at 10. Tom and Shirley do not dispute this finding. Moreover, it has long been the law in Indiana that a commissioner "is an instrument, or arm, of the court for the discharge of certain designated duties, and is primarily answerable to the court." A. Kiefer Drug Co. v. De Lay, 63 Ind. App. 639, 642, 115 N.E. 71, 72 (1917); McFall v. Fouts, 139 Ind. App. 597, 600, 218 N.E.2d 138, 140 (1966). Given the facts of this case, we cannot say that the trial court abused its discretion when it appointed Oberlin to be the commissioner to

conduct the public auction of the family farm. See, e.g., Cohen, 701 N.E.2d at 1255 (holding that the trial court's decision to appoint a real estate agent as commissioner was not an abuse of discretion).

II.

The issue raised by Dan on cross appeal is whether he is entitled to receive appellate attorney fees because of Tom and Shirley's substantive bad faith. Ind. Appellate Rule 66(E) provides that this court "may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." Our discretion to award attorney fees is limited to instances when an appeal is "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." Orr v. Turco Mfg. Co., 512 N.E.2d 151, 152 (Ind. 1987). An appellate tribunal must use extreme restraint in exercising its discretionary power to award damages on appeal "because of the potential chilling effect upon the exercise of the right to appeal." Tioga Pines Living Center, Inc. v. Ind. Family & Social Serv. Admin., 760 N.E.2d 1080, 1087 (Ind. Ct. App. 2001), affirmed on reh'g, trans. denied.

Indiana appellate courts have classified claims for appellate attorney fees into substantive and procedural bad faith claims. Boczar v. Meridian Street Found., 749 N.E.2d 87, 95 (Ind. Ct. App 2001). To prevail on a substantive bad faith claim, the party must show the appellant's contentions and arguments are utterly void of all plausibility. Id. Substantive bad faith "implies the conscious doing of a wrong because of dishonest

purpose or moral obliquity."[3] Wallace v. Rosen, 765 N.E.2d 192, 201 (Ind. Ct. App. 2002).

Here, Dan argues that "it is frivolous to bring a second appeal concerning the choice of the auctioneer when all three of the auction proposals were so similar." Appellee's Brief at 9. Dan suggests that "this appeal is really an effort to further block the public action . . . ." Id. However, Dan has not shown that Tom and Shirley's arguments are utterly devoid of all plausibility. Accordingly, we must reject his argument for appellate attorney fees. See Taflinger Farm v. Uhl, 815 N.E.2d 1015, 1019 (Ind. Ct. App. 2004) (holding that an award of appellate attorney fees was not warranted).

For the foregoing reasons, we affirm the trial court's order of sale procedure and deny Dan's request for appellate attorney fees.

Affirmed.

ROBB, J. and CRONE, J. concur

[3] Procedural bad faith "is present when a party flagrantly disregards the form and content requirements of the Rules of Appellate Procedure, omits and misstates relevant facts appearing in the record, and files briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court." Wallace, 765 N.E.2d at 201. Dan does not argue procedural bad faith.